

Internal Revenue Service

memorandum

CC:TL-N-2221-88
Br2:SJHankin

date:

MAR 29 1988

to: Special Trial Attorney, International, Southwest Region

from: Director, Tax Litigation Division CC:TL

subject:

Request for Technical Advice - Validity of Forms 872 Executed by Common Parent of Consolidated Group of Corporations; Validity of Notice of Deficiency Issued to Common Parent of Consolidated Group of Corporations

This responds to your request, dated December 24, 1987, and received by this office on December 30, 1987, for technical advice with regard to the following two issues.

ISSUES

1. Whether Forms 872 (Consents to Extend Time to Assess Tax) executed by [REDACTED] (" [REDACTED] ") on [REDACTED], and [REDACTED], were effective to extend the limitations period for assessment of corporate income taxes for the taxable years [REDACTED] and [REDACTED] against [REDACTED] and/or the corporations which joined [REDACTED] in the filing of consolidated corporate income tax returns (Forms 1120) for those years.

2. Whether the notice of deficiency in [REDACTED] (which was sent to [REDACTED] as common parent corporation) was issued to the proper common parent. Alternatively, if that notice was improperly issued, whether it is effective against any of the members of the consolidated group.

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RECOMMENDATION

The Government should argue that both of the consents executed by [REDACTED] on [REDACTED], and [REDACTED], and the statutory notice of deficiency issued to [REDACTED] on [REDACTED], were effective to extend the limitations period for assessment of income taxes against the [REDACTED] group for the tax years [REDACTED] and [REDACTED]. We conclude that [REDACTED] had the proper agency authority under Treas. Reg. § 1.1502-77(a) to execute the Forms 872, since it had been the common parent during the tax years at issue. The decisions in the Southern Pacific cases are distinguishable. Likewise, the statutory notice of deficiency issued on [REDACTED], to [REDACTED] was issued to the proper agent of the group with respect to its [REDACTED] and [REDACTED] tax years.

We recommend that the Government not assert as alternative arguments, with respect to both the validity of the consents and the validity of the statutory notice of deficiency, any argument that relies on a contention that the notice and designee-agent rules of Treas. Reg. § 1.1502-77(d) are applicable in spite of the fact that [REDACTED], the old common parent, neither dissolved nor contemplated dissolution.

FACTS

In early [REDACTED], the IRS was conducting an audit of [REDACTED] ("[REDACTED]") and its subsidiaries for the years [REDACTED], [REDACTED], and [REDACTED]. The three year statute of limitation on making an assessment for these taxable years was to expire on [REDACTED], [REDACTED], and [REDACTED], respectively.

[REDACTED], a [REDACTED] Corporation ("[REDACTED]"), owned approximately [REDACTED] % of the outstanding common shares of [REDACTED], a Delaware Corporation, for a number of years. On [REDACTED], [REDACTED] formed two new Delaware Corporations: [REDACTED] ("[REDACTED]") and [REDACTED], with [REDACTED] owning [REDACTED] % of [REDACTED]. The purpose of forming these two corporations was to effect a merger between [REDACTED] and [REDACTED], under which [REDACTED] would then own [REDACTED] % of the [REDACTED] stock after the merger.

Pursuant to the plan, on [REDACTED], [REDACTED] offered to acquire the outstanding shares of [REDACTED] not owned by [REDACTED] through a cash merger in which the minority shareholders would receive \$[REDACTED] per share. The Board of Directors of [REDACTED] rejected that merger offer on [REDACTED]. [REDACTED] then announced that it intended to commence a tender offer for the outstanding minority shares.

On [REDACTED], [REDACTED] made a tender offer for the outstanding minority shares of [REDACTED]. On [REDACTED], [REDACTED] issued the tender offer document which stated that the tender offer would expire on [REDACTED]. [REDACTED] extended this tender offer first to [REDACTED] and later to [REDACTED].

On [REDACTED], [REDACTED] made a capital contribution to [REDACTED] of approximately [REDACTED]% of [REDACTED] shares, which it held. On [REDACTED], as a result of its tender offer, [REDACTED] had received and paid for sufficient shares to own over [REDACTED]% of the outstanding shares of [REDACTED] stock. The Service has previously recognized that these transactions constituted a reverse acquisition within the meaning of Treas. Reg. § 1.1502-75(d)(3).

In [REDACTED], [REDACTED] merged into [REDACTED] in a short-form merger under Delaware law. Through this transaction, [REDACTED] acquired all of the remaining outstanding shares of [REDACTED] stock.

On [REDACTED], and [REDACTED], [REDACTED] and the Service, respectively, executed a Form 872 which purported to extend the expiration of the limitations period for [REDACTED] to [REDACTED]. The Form 872 listed the taxpayers as "[REDACTED]" and was signed by [REDACTED] as "[REDACTED]".

[REDACTED] and the Service executed another Form 872 on [REDACTED] and [REDACTED], respectively, which purported to extend the expiration of the limitations period for [REDACTED] and [REDACTED] to [REDACTED]. This Form 872 listed the taxpayers as "[REDACTED]" and was signed by [REDACTED] as "[REDACTED]".

On [REDACTED], the Service issued to [REDACTED] a notice of deficiency with respect to the [REDACTED], [REDACTED] and [REDACTED] income tax liability of the [REDACTED] group. After the taxpayer raised questions concerning the validity of the first notice, the Service on [REDACTED] issued a second notice of deficiency to [REDACTED] as a protective measure, but only with respect to the [REDACTED] tax of the group.

We incorporate herein by reference the facts contained in the "Facts" section of your request for technical advice, dated [REDACTED].

LAW

Treas. Reg. § 1.1502-77(a) provides, as a general rule, that the common parent for all purposes (with some exceptions, which are not here relevant) is the sole agent for each subsidiary in the group duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Expressly included within the common parent's agency authority is the authority to execute waivers extending the time for assessment. Treas. Reg. § 1.1502-77(a) provides that any such waiver shall be considered as having been given and executed by each subsidiary. Section 1.1502-77(a) also provides that notices of deficiency are to be mailed only to the common parent, and that the mailing to the common parent shall be considered a mailing to each subsidiary in the group. The regulation clearly contemplates that the common parent's authority to act as agent for the affiliated group arises on a year-by-year basis with respect to the group's consolidated income tax liability. Thus, for any given consolidated return year, the corporation that is the common parent for that particular tax year is thereafter the sole agent with respect to any procedural matter that may arise in connection with the group's tax liability for that year. Further, the regulation provides that these rules will apply whether or not a consolidated return is made for any subsequent year, and whether or not there has been a change in subsidiaries.

Section 1.1502-77(a) also provides as a general rule that no subsidiary shall have authority to act for or to represent itself in any manner. Yet, section 1.1502-77 provides two exceptions to that rule. The first is stated in the last sentence of Treas. Reg. § 1.1502-77(a), as follows:

Notwithstanding, the provisions of this paragraph, the district director may, upon notifying the common parent, deal directly with any member of the group in respect of its liability, in which event such member shall have full authority to act for itself.

Section 1.1502-77(d) provides the other exception, here pertinent, which arises in the context of a termination or dissolution of the existence of the common parent. If the existence of the common parent is about to terminate, the common parent is to notify the district director of that fact, and subject to the district director's approval, designate another member to act as agent in its place. If the common parent does

not give such notice, the other members of the group may designate, subject to the approval of the district director, a member to act as common parent. Section 1.1502-77(d) also provides:

or, if such district director has reason to believe that the existence of the common parent has terminated, he may, if he deems advisable, deal directly with any member in respect of its liability.

Treas. Reg. § 1.1502-75(d)(1) provides as a general rule that an affiliated group is deemed to remain in existence as long as the common parent remains the common parent and at least one subsidiary remains affiliated with it. The regulations recognize three exceptions to that general rule, each of which provide that the affiliated group is still deemed to remain in existence even though the common parent does not remain as the common parent. One of these exceptions is the "reverse acquisition" rule of Treas. Reg. § 1.1502-75(d)(3). The reverse acquisition rule provides that an affiliated group will not terminate where the stock or assets of the common parent are acquired by another corporation in exchange for the stock of that other corporation, provided that the shareholders of the acquired common parent, after the acquisition own more than 50 percent of the value of the acquiring corporation's stock. Treas. Reg. § 1.1502-75(d)(3)(i) further provides that after the acquisition, the acquiring corporation is to be treated as the common parent of the group that is deemed to survive the reverse acquisition.

DISCUSSION - ISSUE 1

The taxpayers have contended that the Forms 872 (Consents to Extend Time To Assess Tax) were ineffective to extend the limitations period against [REDACTED] and its subsidiaries for assessment of corporate income taxes for the tax years [REDACTED] and [REDACTED]. The taxpayer's argue that [REDACTED] was not the proper corporate entity to execute waivers of the statute for the [REDACTED] group for their [REDACTED] and [REDACTED] tax years. Rather, they have contended that [REDACTED] ([REDACTED]) was the proper entity to execute the consents for those tax years of the [REDACTED] group.

As their basis for that contention, the petitioners rely on the Tax Court's decisions in the cases of Southern Pacific Co. v. Commissioner, 84 T.C. 395 (1985)^{1/} and Southern Pacific Co. v.

^{1/} This case dealt with post-1965 consolidated return regulations.

Commissioner, 84 T.C. 375 (1985).^{2/} Both of these cases dealt with the issue of which entity, following a reverse acquisition, in which the acquired common parent was merged (by an asset transfer) into the newly formed subsidiary of the acquiring corporation, was the proper party to receive a statutory notice of deficiency for tax years of the consolidated return group occurring prior to the reverse acquisition.

In the Southern Pacific Company cases, old Southern Pacific, the former common parent of the consolidated group, was merged into SPTC, the wholly-owned subsidiary of new Southern Pacific (the new common parent) in a transaction which constituted a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3). The merger was effected by SPTC receiving all the assets of old SP. In that merger old SP ceased to exist. The SP consolidated group attempted to designate SPTC as the successor-designee agent of the group, pursuant to Treas. Reg. § 1.1502-77(d), for the taxable years occurring prior to the reverse acquisition, but the Tax Court's opinions indicate the Service refused to recognize this designation. Instead, the Service treated new SP as the common parent of the SP group for the pre-reverse acquisition tax years. As such, the Service issued a Statutory Notice of Deficiency to new SP for tax years of the old group occurring prior to the reverse acquisition. The taxpayer SP argued that the case should be dismissed on the ground that SPTC, rather than the new SP, was the successor agent for the group and was the proper entity to receive the statutory notice of deficiency for the group with respect to the pre-reverse acquisition years.

The Tax Court in the Southern Pacific cases held that as a result of the reverse acquisition new SP became the common parent for the group and was, therefore, the proper entity to receive the statutory notice of deficiency for the group. In addition, the Tax Court in Southern Pacific also indicated that the Forms 872 executed by New SP were also valid as having also been executed by the proper entity. Based on the Tax Court's holdings in the Southern Pacific cases, [REDACTED] argues that [REDACTED], as the acquiring corporation became the new common parent of the [REDACTED] group through a reverse acquisition and was thus the proper party under the consolidated return regulations to execute the consents for the [REDACTED] and [REDACTED] tax years of the [REDACTED] group.

^{2/} This case dealt with the pre-1966 consolidated return regulations.

You suggest that the holdings in the Southern Pacific cases should be argued as not extending to the circumstances presented in the [REDACTED] cases, because [REDACTED] was still in existence as of the dates the Forms 872 were executed. We agree, but recommend that the Southern Pacific cases be distinguished with the following analysis.

Based on the fact that old SP had gone out of existence, the petitioners in Southern Pacific argued that the proper agent of the group should be determined under Treas. Reg. § 1.1502-77(d). Treas. Reg. § 1.1502-77(d) provides rules for determining a designee successor agent of the group where the old common parent has gone out of existence or is contemplating dissolution. The petitioners had contended in Southern Pacific that they had properly designated SPTC (new SP's wholly-owned corporation) as the successor agent, pursuant to the designation rules of Treas. Reg. § 1.1502-77(d).^{3/} In the instant case, the old common parent, [REDACTED], never went out of existence, nor contemplated dissolution. As such, a determination of a proper designee successor agent under the rules of Treas. Reg. § 1.1502-77(d) is not even relevant.

^{3/} Treas. Reg. § 1.1502-77(d) is as follows:

(d) Effect of dissolution of common parent corporation. If the common parent corporation contemplates dissolution, or is about to be dissolved, or if for any other reason its existence is about to terminate, it shall forthwith notify the district director with whom the consolidated return is filed of such fact and designate, subject to the approval of such district director, another member to act as agent in its place to the same extent and subject to the same conditions and limitations as are applicable to the common parent. If the notice thus required is not given by the common parent, or the designation is not approved by the district director, the remaining members may, subject to the approval of such district director, designate another member to act as such agent, and notice of such designation shall be given to such district director. Until a notice in writing designating a new agent has been approved by such district director, any notice of deficiency or other communication mailed to the common parent shall be considered as having been properly mailed to the agent of the group; or, if such district director has reason to believe that the existence of the common parent has terminated, he may, if he deems it advisable, deal directly with any member in respect of its liability.

A reading of the Southern Pacific cases reveals that the Government's argument (that the reverse acquisition rule of Treas. Reg. § 1.1502-75(d)(3) required that new SP be recognized as the successor agent for pre-acquisition tax years) was just a responsive argument to the petitioners' assertion that Treas. Reg. § 1.1502-77(d) (or its predecessor Treas. Reg. § 1.1502-16A(c)) was the controlling provision. Stated another way, at issue in the Southern Pacific cases was whether either the designation rules of Treas. Reg. § 1.1502-77(d) (and its predecessor 1.1502-16A(c)) or the reverse acquisition rule of Treas. Reg. § 1.1502-75(d)(3) should dictate who is the proper successor agent of the group.

In the instant case, since the old common parent, [REDACTED], never ceased to exist or even contemplated dissolution, the designation rules of Treas. Reg. § 1.1502-77(d) (also found in its predecessor Treas. Reg. § 1.1502-16A(c)) are clearly not applicable. Instead, the issue that is presented by the instant case is whether either the reverse acquisition rule of Treas. Reg. § 1.1502-75(d)(3) or the general agency rule of Treas. Reg. § 1.1502-77(a) [that the entity that is the common parent for a particular tax year is thereafter the group's sole agent for such year for tax purposes] dictates which entity is the proper agent of the group for preacquisition years.

Accordingly, the instant case presents a new issue not addressed by the Tax Court in the Southern Pacific cases.

A key point of distinction between the instant case and the Southern Pacific cases is that in the Southern Pacific cases the reverse acquisition was an asset acquisition (the assets of old SP) while in the instant case the reverse acquisition was a stock acquisition (the stock of [REDACTED]). A reading of both Southern Pacific opinions reveals that, inspite of the fact that old SP was merged into SPTC, (a wholly-owned subsidiary of new SP) the Tax Court considered new SP, and not SPTC, to be the successor in interest to old SP. In one of the Southern Pacific cases, the Tax Court analyzed the reverse (asset) acquisition by concluding that the substance of the transaction was an asset acquisition by new Southern Pacific with a simultaneous "drop down" of the operating assets to its wholly owned subsidiary (SPTC). Moreover, the Tax Court viewed the fact that old SP was merged into SPTC and not new SP as a matter of form. Based on this analysis, the Tax Court in Southern Pacific concluded that in substance new Southern Pacific was a continuation of the

former Southern Pacific. 84 T.C. 387 The Tax Court, however, only relied upon that rationale in one of the Southern Pacific cases to support its conclusion that an application of the reverse acquisition rule determines which entity should act as agent for the group for pre-reverse acquisition years. 84 T.C. 375, 386.

The Tax Court's basis for that conclusion was its recognition that Treas. Reg. § 1.1502-75(d)(3) constitutes a substance-over-form approach. That is, the approach adopted in section 1.1502-75(d)(3) is that where there is sufficient shareholder continuity from the acquired corporation to constitute control of the acquiring corporation the substance of changes in the group's corporate structure should control for purposes of all consolidated return provisions^{4/} 84 T.C. 386. Accordingly, the Southern Pacific cases can be explained on the basis that, although in form old SP went out of existence through its merger into SPTC, in substance old SP was merged into new SP. Since the Court treated new SP as a continuation of old SP, new SP was entitled to succeed to old SP's agency capacity for purposes of Treas. Reg. § 1.1502-77.5/

By contrast, in the instant case since [REDACTED] remained in existence, there is no question of who was the successor to the old common parent. That is, since [REDACTED] acquired the stock rather than the assets of [REDACTED] and since [REDACTED] survived its merger with [REDACTED] (a wholly-owned subsidiary of [REDACTED]), no argument can be made in this case that [REDACTED] was in substance the successor to [REDACTED].

We note that the successor rationale, spelled out above, was only relied upon in one of the Southern Pacific cases. 84 T.C. 375. That was the case considering the tax years 1962-1965. However, since both cases were addressed to the same reverse acquisition rule of Treas. Reg. § 1.1502-75(d)(3) and since section 1.1502-77(d) and section 1.1502-16A(c) are substantially alike, we can see no reason why such rationale is not equally applicable to later tax years.

^{4/} See, B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders, par. 1524 at 15-77 (4th ed. 1979).

^{5/} Such analysis derives from the substance-over-form approach of Treas. Reg. § 1.1502-75(d)(3) and is thus independent of the section 381 rules with respect to carryovers in certain corporate acquisitions.

We recognize that the Southern Pacific cases contain the following language:

Accordingly, we hold that the reverse acquisition rule applies in determining which entity succeeds the common parent as agent for the affiliated group with respect to years both before and after the reverse acquisition.

It follows from our view of the scope of the operation of the rule that section 1.1502-75(d)(3), Income Tax Regs. effectively overrides Section 1.1502-77 Income Tax Regs. with respect to a determination of the successor agent for preacquisition years following a reverse acquisition. 84 T.C. 403, 404

██████████ will probably argue that this all-inclusive language means that in any reverse acquisition, the new common parent is always the proper agent for all tax matters, including consents, with respect to preacquisition tax years.

The rebuttal to that contention is that the factual situation presented in the instant case (a reverse-acquisition where stock rather than assets are acquired and where the old parent continues to exist) was not before the Tax Court in Southern Pacific, and therefore any broad language in that case is no more than dicta. Furthermore, as explained above the rationale relied upon by the Tax Court in one of the Southern Pacific cases is clearly inapplicable to the instant case.

To summarize, we believe that, in effect, the Tax Court in Southern Pacific refused to apply § 1.1502-77(d) to the facts of that case, because even though old SP did go out of existence, the Tax Court concluded that the application of the reverse acquisition rule of Treas. Reg. § 1.1502-75(d)(3) was consistent with a recognition that in substance new SP was a continuation of old SP. As such, the application of Treas. Reg. § 1.1502-75(d)(3) dictated that new SP succeeded to old SP's agency authority for preacquisition tax years following the reverse acquisition. In that manner, it can be said that section 1.1502-75(d)(3) effectively overrode section 1.1502-77(d).

In the instant case, however, the form of the reverse acquisition and ensuing merger transaction is identical to the substance of the transaction i.e., a stock acquisition by ██████████ of ██████████ stock followed by the merger of ██████████ into ██████████. In the instant case, ██████████ does not cease to exist and accordingly the application of Treas. Reg. § 1.1502-75(d)(3) does not warrant a conclusion that ██████████ was in substance a continuation of ██████████.

Accordingly, we agree with your conclusion that the instant case is distinguishable from the Southern Pacific cases so that the application of the agency rules of Treas. Reg. § 1.1502-77(a) to this case is in no way affected by the reverse acquisition rules.

You have presented several alternative arguments for sustaining the validity of the Forms 872. First, as a fallback argument, in the event that [REDACTED]'s authority as common parent for preacquisition years is determined to have been terminated by the reverse acquisition, you contend that [REDACTED] was under a duty to notify the district director of this fact, and to designate a new agent entity for the group, pursuant to Treas. Reg. § 1.1502-77(d). If [REDACTED] can be shown not to have given such notification and designation you contend that the consolidated group would have continued to be bound by [REDACTED]'s acts as common parent agent.

We recognize that Treas. Reg. § 1.1502-77(d) provides that if a common parent dissolves or contemplates dissolution it is required to notify the district director of such fact and to designate another to act as agent in its place. We also recognize that Treas. Reg. § 1.1502-77(d) further provides that until such notice designating a new agent has been received and approved by the district director, any notice of deficiency or other communication mailed to the still existing common parent shall be considered as having been properly mailed to the agent of the group.

Yet, the rules of Treas. Reg. § 1.1502-77(d) are expressly limited to the dissolution or contemplated dissolution of the common parent. Here, [REDACTED] was neither dissolved nor did it contemplate dissolution. To expand the scope of a clearly circumscribed consolidated return provision (Treas. Reg. § 1.1502-77(d)) so as to require designation of a new designee agent even though [REDACTED] is still in existence and has never contemplated dissolution is not supportable and is simply refuted by the clear language of Treas. Reg. § 1.1502-77(d). Moreover, to prevail on such argument would only further confuse the application of the agency rules under Treas. Reg. § 1.1502-77(d).

Finally, this argument seems somewhat contrary to the basis of our argument for distinguishing the Southern Pacific cases. Our view of Southern Pacific is that, since the Tax Court in that case concluded that new SP is in substance a continuation of old SP, the dissolution rules of Treas. Reg. § 1.1502-77(d) were inapplicable. Yet, your fallback argument for this case favors expanding the scope of Treas. Reg. § 1.1502-77(d). Finally, your facts indicate that [REDACTED] did notify the District Director of the reverse acquisition in its letter to the District Director, dated [REDACTED].

Accordingly, we recommend that you not advance the above argument.

Another "fallback" argument that you have presented for sustaining the validity of the Forms 872 is that [REDACTED] was designated, pursuant to the designee rules of Treas. Reg. § 1.1502-77(d), by the [REDACTED] consolidated group to act as the new agent for the group. You argue that [REDACTED] made such designation by virtue of the Tax Services Agreement and surrounding circumstances. Like the previous argument, this argument requires that the scope of Treas. Reg. § 1.1502-77(d) be expanded to include situations where the common parent has not dissolved or even contemplated dissolution. We recommend that this argument not be made for the same reasons given with respect to the previous argument. In addition, we note that the Tax Services Agreement was an agreement strictly between [REDACTED] and [REDACTED]. Since the Service was not a party to this agreement, we fail to see how it could constitute a notice to the Service as contemplated under Treas. Reg. § 1.1502-77(d). Furthermore, section 1.1502-77(d) requires that such notice be in writing. As such, we fail to see how "surrounding circumstances" could ever satisfy the written notice requirement of Treas. Reg. § 1.1502-77(d).

As a further note, we are aware of no authority for arguing that a corporation which is formally incorporated and has issued stock can be treated as nonexistent merely because it is not "fully operational."

Finally, you assert that it can be argued that the Forms 872 were effective at least as to [REDACTED], based on an argument that the Service chose to deal directly with [REDACTED] with respect to its tax liability, pursuant to Treas. Reg. § 1.1502-77(a).^{6/} Treas. Reg. § 1.1502-77(a), as here relevant, provides:

Notwithstanding the provisions of this paragraph, the district director may upon notifying the common parent, deal directly with any member of the group in respect of its liability, in which event such member shall have full authority to act for itself.

The controversy arising from this argument is whether the Service notified [REDACTED] that it intended to deal with [REDACTED] with respect to its tax liability for the tax years [REDACTED] and [REDACTED]. The above notice requirement of Treas. Reg. § 1.1502-77(a), unlike the notice requirement set forth in Treas. Reg. § 1.1502-77(d), contains no wording that such notice be in writing. Accordingly, we believe a constructive notice argument is appropriate.

^{6/} Under Treas. Reg. § 1.1502-6 [REDACTED]'s separate tax liability is the entire consolidated tax of the group.

The Tax Court in the case of Cragie Inc. v. Commissioner, 84 T.C. 467 (1985) was called upon to consider whether certain correspondence between the Service and the taxpayer constituted a notice to the District Director that it was dealing directly with a member of the group with respect to its tax liability. The Tax Court concluded that "The District Director's communications with petitioner did not indicate an intention by the Government to deal directly with the petitioner...." 84 T.C. 475. We believe that such statement is in no way inconsistent with an argument that notice can be inferred from a group of documents or circumstances. Yet, the documents or circumstances must demonstrate an intention by the Government to deal directly with the corporation. Such issue is clearly one of fact.

We conclude that such argument can be appropriately made, but as a question of fact we believe the decision to advance such argument in this case should be left to the discretion of the trial attorney. As such, we state no opinion as to the particular merits of this argument in the context of this case.

Finally, we suggest that you explore the possibility of arguing that even if [REDACTED] is considered to be the proper agent entity, that [REDACTED] was acting as its agent - an agent of the agent. (subagency relationship). Certainly, a common parent corporation, who is acting as the agency entity for a consolidated return group, pursuant to Treas. Reg. § 1.1502-77, is typically represented by its officers. In turn these officers are acting as agents of the corporation and therefore subagents with respect to the group. This argument should in no way be premised on the designated agency rules of Treas. Reg. § 1.1502-77(d).

DISCUSSION - ISSUE 2

You have also inquired as to whether the notice of deficiency issued on [REDACTED], by the Government in docket no. 32116-86 to [REDACTED] was valid. We understand that such notice was with respect to the [REDACTED], [REDACTED] and [REDACTED] tax years. We also recognize that the validity of a consent extending the assessment statute for the tax year [REDACTED] to [REDACTED] is not being challenged. In addition, the Service has protected itself with regard to the [REDACTED] tax year by timely issuing a second notice of deficiency to [REDACTED], as a protective measure. Accordingly, your problem "boils down" to whether the notice of deficiency issued to [REDACTED] was valid, so as to determine whether the statutory time had elapsed to make assessments with respect to the [REDACTED] and [REDACTED] tax years.

Treas. Reg. § 1.1502-77(a) provides that notices of deficiency must be mailed to the common parent and the mailing to the common parent shall be considered as a mailing to each

subsidiary in the group. In both of the Southern Pacific cases the Tax Court made agency determinations both with respect to the notices of deficiency and the consents. 84 T.C. 375, 387; 84 T.C. 395, 405

We, therefore, conclude that the entire agency discussion set forth in ISSUE I with regard to the validity of the consents is equally applicable with respect to the validity of the statutory notice of deficiency sent to [REDACTED].

Accordingly, we agree with your conclusion that the statutory notice was properly issued to [REDACTED], since [REDACTED] continued to exist and therefore under Treas. Reg. § 1.1502-77(a) continued to be the proper agent entity of the group for the pre-reverse acquisition years.

You have also inquired that if the notice is determined to be improperly issued against the [REDACTED] group whether it could still be effective against any one of the members of the [REDACTED] group. As in the case of the consents, the Government might argue that under the facts presented the Service had chosen to deal directly with [REDACTED] with respect to its separate tax liability. As such, the statutory notice to [REDACTED] could be argued to be effective against [REDACTED] and only against [REDACTED].

Finally, we wish to comment on the possibility of arguing that [REDACTED] should be equitably estopped from denying the validity of the waivers and the notice of deficiency. To claim equitable estoppel, the Service must always establish that the taxpayer by his conduct, acts, language or silence misrepresented to the Service the existence of a material fact. See, Paramount Warrior, Inc. v. Commissioner, T.C. Memo. 1976-400. The misrepresentation must be one of fact. A mere error of law coupled with a timely disclosure of facts which are known by or made available to the Commissioner is inadequate to create estoppel. See, City Machine & Tool Co. v. Commissioner, 21 T.C. 937 (1954).

In the instant case, the Service was aware of all relevant facts with respect to the reverse acquisition and the resulting changes in the structure of the [REDACTED] group. Since [REDACTED] has argued that the Service applied an erroneous rule of law to those facts in determining which entity was the proper agent of the [REDACTED] group for its pre-acquisition tax years, we conclude that [REDACTED] is not estopped from advancing its contention.

We recognize that there is language in several private letter rulings which the taxpayer believes supports its position that [REDACTED] rather than [REDACTED] is the proper agent entity of the [REDACTED] group for the preacquisition tax years, i.e., that the holding of the Southern Pacific cases controls this case.

Private letter ruling [REDACTED] was issued on [REDACTED] and was concerned with the application of Treas. Reg. § 1.1502-75(d)(3) (reverse acquisition rules) to the following transaction. The stock of the old common parent ("Corp D") was contributed to the capital of a newly-formed U.S. corporation ("Corp B") by a more than 80% owner, a foreign corporation. The Service ruled that the overall transaction was a reverse acquisition and the ruling specified the proper tax return periods and the resulting filing dates. The ruling then concluded with the following two sentences:

For purposes of filing the consolidated return for the group of corporations for the taxable year ending ****, Corp. D is considered to remain the common parent for the entire taxable year. For all other purposes, commencing with **** the date of the reverse acquisition, Corp. B is the common parent of the group of corporations of which Corp. D was the common parent.

[REDACTED] argues that this sentence should be construed to mean that a new common parent in a reverse acquisition becomes the agent for the continuing group for pre-reverse acquisition consolidated return years even where the old common parent remains in existence as a subsidiary of the new common parent.

We believe that the language "For all other purposes, commencing with *** the date of the reverse acquisition," should be construed to mean that Corp B is the common parent of the group only for tax years commencing with or after the date of the reverse acquisition. Construed in this manner, the two sentences are not inconsistent with a conclusion that Corp D is the proper agent entity with respect to tax years prior to the reverse acquisition.


Private letter rulings, [REDACTED] and [REDACTED], which were issued on [REDACTED], and [REDACTED], respectively, involved the question of whether a consolidated return group should be considered as remaining in existence. In both rulings the old common parent or its nominees formed a holding company with the intention of the holding company becoming the new common parent of the group. Subsequently, all the outstanding stock of the old common parent was exchanged for stock of the new holding company. The Service ruled that since the transaction was

indistinguishable in substance from a transaction described in section 1.1502-75(d)(2)(ii) the old group would be treated as remaining in existence after the transaction with the newly formed holding company becoming the common parent of the affiliated group. Both of the rulings also conclude that the holding company shall be considered the common parent of the group immediately after the transaction, "for all purposes, including sections 1.1502-75(h)(1) and 1.1502-77(a) of the regulations except where it is specifically provided in the regulations that the [old common parent] is still to be treated as the common parent." [REDACTED] argues that this language should be construed as implying that the new common parent holding company becomes the agent for the continuing group for pre-reverse acquisition consolidated return years, inspite of the fact that the old common parent remained in existence. Here again, we believe that such language should be construed as only referring to tax periods after the transaction. Alternatively, it can be argued that Treas. Reg. § 1.1502-77(a) is that type of regulatory provision in that it specifically provides that [REDACTED] is still to be treated as the common parent for purposes of pre-acquisition tax years. In other words, it provides a regulatory exception to the general rule that the new common parent is to be treated as the common parent "for all purposes."

In any event, private letter rulings have no precedential value, because section 6110(j)(3) provides that private letter rulings cannot be used or cited as precedent.

Nevertheless, we are currently in the process of reviewing the above discussed letter rulings with the Corporate Tax Division. If the status of these letter rulings is in any way modified, we will convey such information to you.

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Enclosure:
Miscellaneous Law File